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No. 92-1130

In the Supreme Court of the United States

OCTOBER TERM, 1992

MARY JANE JENKINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the "pattern of racketeering activity" and "enterprise" elements of RICO are unconstitutionally vague when applied to a business dealing in expressive materials.

2. Whether the post-trial forfeiture provisions of RICO violate the First or Eighth Amendment when the predicate acts of racketeering are obscenity violations and the forfeited property consists of the assets of a business dealing in expressive materials.

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OPINION BELOW

The opinion of the court of appeals, Pet. App. A1-A7, is reported at 974 F.2d 32.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 1992. The petition for a writ of certiorari was filed on December 30, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. A grand jury sitting in the Southern District of Texas indicted petitioner on one count of conducting an enterprise through a pattern of racketeering

activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c); one count of conspiring to commit that offense, in violation of 18 U.S.C. 1962(d); and nine counts of transporting obscene material in interstate commerce, in violation of 18 U.S.C. 1462. The charged enterprise consisted of six persons, including petitioner, and 16 unindicted corporations, each of which was alleged to be controlled by petitioner and to be connected with the operation of "adult" bookstores and/or peep show video arcades. Except for two foreign holding companies, the corporations were scattered throughout the South. The indictment listed ten predicate acts of racketeering, nine of which corresponded to the substantive interstate transportation counts and one of which dealt with promoting obscene material under state law. The indictment sought forfeiture, under 18 U.S.C. 1963(a), of the 16 corporations, bank accounts belonging to several of the corporations, money seized in raids, and petitioner's automobile and residence. Pet. App. A37-A53.

2. On April 10, 1991, the government obtained an *ex parte* restraining order, under 18 U.S.C. 1963(d), that prohibited petitioner, her five co-defendants, and the unindicted corporations from selling, assigning, transferring, encumbering, or removing from the jurisdiction of the court any assets owned by or owed to them. Pet. App. A13-A17. The order required that weekly payments to petitioner from the sale of four adult bookstores be turned over to the United States Marshals Service to be held until it could be determined whether they were forfeitable upon

conviction. *Id.* at A17-A18. It also directed petitioner to maintain the properties and "to abstain from using the * * * properties and enterprises in any way to violate any state, federal or local laws." *Id.* at A18. Finally, the order provided that:

> No person shall consider this Order as a restraint or prohibition to the carrying on of any lawful activity or business, and the above mentioned businesses and commercial establishments are not restrained or prohibited from operating any lawful businesses in a normal business manner, including the payment of salaries, outstanding debts, and liabilities that exist as of the date of the filing of this Order, as long as the normal conduct of business does not dissipate or diminish the value, as of April 9, 1991, of the assets, properties, and interests subject to forfeiture to the government. Nothing in this Order shall be construed to restrain the dissemination of visual or printed matter, nor to condone the illegal sale or distribution of obscene material.

Id. at A19.

3. Thereafter, petitioner moved that the restraining order be lifted, arguing that RICO's substantive provisions and its forfeiture and restraining order provisions violate the First Amendment as applied to persons charged with selling obscene material. After a hearing, the district court rejected petitioner's challenge to the restraining order. Pet. App. A8-A11. In so doing, the court explained that it had "fashioned its order sufficiently narrow[ly] such that the defendant may continue in the business of selling constitu-

tionally protected materials." *Id.* at A10. The court added that "[u]nder the terms of the Court's order, the defendant has continued conducting business. There is no evidence that the businesses have not been able to pay their bills as a result of this order, or to otherwise conduct the businesses' day-to-day operations." *Ibid.* The court held that "[t]he fact that the defendants are more cautious about the products that they are selling is not prior restraint. It is against the law to sell obscene materials. That fact alone is sufficient reason to pause and be cautious." *Ibid.* The court also held that "[t]he First Amendment is not implicated by the restraint from sale or use of personal or real property that is derived from First Amendment activities." *Id.* at A11. The court explicitly reserved its ruling on petitioner's challenges to the constitutionality of the RICO statute. *Ibid.*

4. On appeal, the court of appeals held, first, that the district court's order refusing to lift the restraining order was immediately appealable. Nonetheless, the court declined to address petitioner's constitutional challenges to the RICO statute, stating that, "[a]s a general rule, courts of appeals should conduct only a limited review in interlocutory appeals, and should address only the propriety of the order that gave rise to the appeal." Pet. App. A3. The court explained that, in order to resolve petitioner's challenges to the RICO statute, it would have to act "without the benefit of a complete record, specialized findings of fact, and the reasoned judgment of the district court." *Id.* at A4. After noting that the issue of the constitutionality of RICO's forfeiture and restraining order provisions is before this Court in

Alexander v. *United States*, cert. granted, 112 S. Ct. 3024 (1992) (No. 91-1526) (argued Jan. 12, 1993), the court concluded that "[w]isdom dictates that we await the Supreme Court's teaching." Pet. App. A4.

The court of appeals then rejected petitioner's claim that the restraining order unconstitutionally authorized the seizure of presumptively protected expressive material without a prior judicial determination of obscenity. The court explained that the restraining order "did not effect * * * a seizure," since, "[a]s the Government conceded at oral argument, [it] does not interfere with the sale even of obscene materials." Pet. App. A4-A5.

The court of appeals also rejected petitioner's contention that the restraining order is invalid because it directs the seizure of funds and the payment of certain money received to the United States Marshals Service. While acknowledging that "restraints on the use of funds might under some circumstances improperly impede a defendant's ability to exercise First Amendment rights," the court held that "there is nothing to indicate that this has occurred in the instant case." Pet. App. A5. The court explained that there was no evidence that the restraining order had affected petitioner's ability to carry on her businesses. *Ibid.*

Additionally, the court of appeals held that the issuance of the *ex parte* restraining order did not deny petitioner procedural due process. The court explained that the *ex parte* procedure was necessary in order to prevent petitioner from detrimentally affecting the government's interest in forfeitable property. Pet. App. A6. The court also took note of

the fact that petitioner had received a judicial hearing on her motion to dissolve the restraining order. *Ibid.*

Finally, the court of appeals held that the restraining order does not impermissibly bind unindicted corporations. In so holding, the court invoked 18 U.S.C. 1963(d)(1), which explicitly permits courts to "take any other other action" deemed necessary "to preserve the availability of property" subject to forfeiture. Pet. App. A6. The court observed that, under the indictment, the corporations "are not innocent, unrelated third parties, but rather are an integral part of the criminal enterprise and under [petitioner's] total and exclusive control." *Id.* at A7.[1]

ARGUMENT

1. The RICO statute makes it a crime to participate in the conduct of an "enterprise" through a "pattern of racketeering activity." 18 U.S.C. 1962(c). Petitioner contends that the restraining order entered in this case must be lifted, not because the order is itself unconstitutionally vague, but because the statutory "pattern of racketeering" and

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[1] Approximately one month before the court of appeals rendered its decision, the district court entered an order suppressing evidence on the ground that it was obtained in violation of the Fourth Amendment. Without the suppressed evidence, the government cannot proceed with the prosecution. The government is currently deciding whether to appeal the suppression order. In the meantime, petitioner has not asked the district court to lift the restraining order, and the district court has not done so. Because of the possibility of a successful government appeal from the suppression order, the issue of the legality of the restraining order is not moot.

"enterprise" elements of RICO are unconstitutionally vague as applied to obscenity offenses. Pet. 9-21.

a. As an initial matter, petitioner's challenge to the constitutionality of 18 U.S.C. 1962(c) is premature. Both courts below declined to address the issue. Although the court of appeals held that it had jurisdiction to conduct an interlocutory review of the propriety of the restraining order, the court expressly refused to address claims that went beyond the legality of the restraining order and challenged the validity of the underlying RICO counts themselves. That approach was in keeping with clear congressional intent. The Senate report pertaining to the RICO restraining order forfeiture provisions indicates that, in authorizing the government to obtain a post-indictment restraining order without prior notice or a hearing, Congress did not intend to deprive the district court of authority to hold a hearing on the validity of the order after its entry. S. Rep. No. 225, 98th Cong., 1st Sess. 203 (1983). The Senate report emphasizes, however, that "at such a hearing the court is not to entertain challenges to the validity of the indictment." *Ibid.* See *United States* v. *Thier*, 801 F.2d 1463, 1469-1470 (1986), modified on other grounds, 809 F.2d 249 (5th Cir. 1987).[2]

[2] A defendant may not take an interlocutory appeal from the denial of a pretrial motion challenging the constitutionality of the statute under which he is charged even though the charge may have resulted in a restraint on his liberty. Accordingly, there is nothing unusual in barring a defendant from attacking such a statute on an interlocutory appeal from the issuance of a pretrial restraining order, which only restrains a defendant's ability to transfer or remove property that is alleged to be the subject of criminal forfeiture.

Petitioner's challenge to the constitutionality of 18 U.S.C. 1962(c)—which if valid would require dismissal of the RICO counts in the indictment—is precisely the type of claim Congress sought to foreclose at this juncture. If petitioner's case goes to trial, she is convicted on a RICO count, and that conviction is upheld on appeal, she may then raise her vagueness claim in this Court.

b. In any event, petitioner's vagueness claim fails on the merits. Absent First Amendment considerations, a defendant cannot challenge a statute for vagueness on the ground that there is some uncertainty regarding the full reach of the law in marginal cases not before the court. Rather, the defendant must show that the law is vague as applied to the particular conduct with which he is charged. See, *e.g.*, *Chapman* v. *United States*, 111 S. Ct. 1919, 1929 (1991). In this case, no First Amendment interest is affected, since the underlying statutes incorporate the definition of obscenity adopted in *Miller* v. *California*, 413 U.S. 15 (1973).[3] Under these circumstances, the RICO statute does not reach constitutionally protected conduct, and a facial challenge to that statute cannot succeed. See *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 57-58

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[3] The Court in *Miller* adopted the following three-part definition of obscenity: (1) the average person applying contemporary community standards would find that the work taken as a whole appeals to the prurient interest; (2) the work depicts or describes in a patently offensive way sexual conduct specifically defined by the applicable state law; (3) the work taken as a whole lacks serious literary, artistic, political, or scientific value. 413 U.S. at 24.

(1989); *Adult Video Ass'n* v. *Barr*, 960 F.2d 781, 787-788 (9th Cir. 1992), petition for cert. pending (on other grounds), No. 92-773. As this Court noted in *Miller*, "[i]f a state law that regulates obscene material is [limited according to the *Miller* standards] * * * First Amendment values * * * are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary." 413 U.S. at 25.

c. The RICO statute defines a "pattern of racketeering activity" as requiring at least two predicate racketeering acts within a ten-year period. 18 U.S.C. 1961(5). State and federal obscenity offenses qualify as racketeering acts. 18 U.S.C. 1961(1) (A) and (B). In *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989), this Court explained that "to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity." The requisite relatedness of predicate acts is established, among other ways, by showing that each act furthered the goals of the same enterprise. See, *e.g.*, *United States* v. *Phillips*, 664 F.2d 971, 1011-1012 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982); *United States* v. *Weisman*, 624 F.2d 1118, 1122 (2d Cir.), cert. denied, 449 U.S. 871 (1980). Continuity is established by proving "a series of related predicates extending over a substantial period of time" or by showing that "the predicate acts or offenses are part of an ongoing entity's regular way of doing business." *H.J. Inc.*, 492 U.S. at 242.

In this case, the indictment charges that, during a two-year period, petitioner committed at least ten predicate offenses involving the shipment or promotion of obscene material. Each offense occurred in Houston as part of petitioner's ongoing pornography business. Because petitioner's multiple obscenity offenses advanced the cause of a single, ongoing enterprise engaged in the transportation, distribution, and sale of obscene material, there can be no serious contention that petitioner lacked notice that she was engaging in a pattern of racketeering activity. See *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972) (to sustain a vagueness attack, the defendant must show that the statute fails to give a person of ordinary intelligence notice that his conduct is forbidden).

Petitioner argues that the RICO statute is impermissibly vague when the alleged predicate acts are obscenity offenses, because sexually explicit material is presumed to be nonobscene until it is judicially held to be otherwise. Pet. 13-16. This Court rejected precisely the same claim in *Fort Wayne Books, Inc.* v. *Indiana*, *supra*. There, the Court considered the constitutionality of a state RICO statute that was indistinguishable in any pertinent respect from the federal RICO statute at issue here. Previously, this Court in *Miller* had adopted a test for obscenity in order to "provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution." 413 U.S. at 27. Because the state RICO statute at issue in *Fort Wayne Books* "totally encompasse[d] the [state] obscenity law," 489 U.S. at 58, and passed muster

under *Miller*, this Court in *Fort Wayne Books* viewed the defendant's vagueness claim as foreclosed by *Miller*. 489 U.S. at 57. Accordingly, the Court held that the state RICO law was not unconstitutionally vague when obscenity violations served as predicate offenses. *Id.* at 58. Indeed, the Court observed that, since "obscenity-related RICO prosecutions [are] possible only where one is guilty of a 'pattern' of obscenity violations[,] it would seem that the RICO statute is inherently *less* vague than any state obscenity law: a prosecution under the RICO law will be possible only where all the elements of an obscenity offense are present, and then some." *Id.* at 58-59 n.7. See *Adult Video Ass'n* v. *Barr*, 960 F.2d at 786.[4]

d. Nor is the enterprise element of a RICO offense unconstitutionally vague. The RICO statute defines an "enterprise" as including "any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. 1961(4). In *United States* v. *Turkette*, 452 U.S. 576, 583 (1981), the Court explained that an association-in-fact enterprise is "a group of persons associated together for a common purpose of engaging in a course of conduct." Here, the plain language of the statute put petitioner on notice that

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[4] Petitioner maintains that "[s]ince each and every book, magazine, motion picture or video is judged individually, the distribution of one sexually explicit and obscene item does not pose a threat of continued activity." Pet. 14. But a defendant who commits a series of obscenity violations over an extended time period as part of an ongoing pornography business, which is what petitioner is charged with having done here, does pose a threat of continued criminal activity—indeed, he has already engaged in such activity.

she, her co-defendants, and the unindicted corporations that she controlled constituted an association-in-fact enterprise engaged in the business of distributing adult books, magazines, and other material, as charged in the indictment. See *United States* v. *Hawes*, 529 F.2d 472, 479 (5th Cir. 1976) (enterprise element of RICO offense not unconstitutionally vague).

Petitioner argues that persons engaged in the distribution of sexually explicit material that has not yet been judicially held obscene "cannot know when that entity or some members became a criminal enterprise." Pet. 19. This Court rejected the same argument in *Fort Wayne Books*, as discussed above. Petitioner also misapprehends the distinction between a RICO enterprise and the predicate acts of racketeering. The enterprise is an "ongoing organization, formal or informal," *Turkette*, 452 U.S. at 583. As such, "it is an entity separate and apart from the pattern of activity in which it engages." *Ibid.* Accordingly, the fact that the predicate acts charged against a RICO defendant are obscenity offenses has no bearing on the defendant's understanding of the enterprise element; the concept of a RICO enterprise does not change according to the nature of the predicate acts.[5]

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[5] Petitioner makes much of the point that, because an item can be adjudged obscene under *Miller* only in relation to the contemporary standards of the community in which the alleged offense was committed, "[a] [RICO] defendant or defendants must have activities in the particular judicial district in which the predicate obscenity charge is brought." Pet. 19-21. Whatever import that claim may have in other cases, it has none here, since petitioner is being prosecuted in the Southern

2. Petitioner contends that the restraining order must be lifted for the additional reason that the post-trial forfeiture provision of RICO, 18 U.S.C. 1963(a), violates the Constitution when the predicate acts of racketeering are obscenity violations and the forfeited property consists of the assets of a business dealing in expressive material. Pet. 22-30. In particular, she argues that such RICO forfeitures constitute unlawful prior restraints on speech in violation of the First Amendment, and that they are disproportionate to the RICO offense in violation of the Eighth Amendment.[6]

Although the questions that petitioner raises regarding the constitutionality of 18 U.S.C. 1963(a) are currently before the Court in *Alexander* v. *United States*, *supra*, it is unnecessary for the Court to hold this petition pending its decision in that case. Just as

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District of Texas and the prosecution is based on alleged obscenity offenses committed within that district.

[6] In passing, petitioner also challenges the constitutionality of the "relation back" provision of the RICO statute, 18 U.S.C. 1963(c), pursuant to which "[a]ll right, title, and interest" in property subject to forfeiture under RICO "vests in the United States upon the commission of the act giving rise to forfeiture." Pet. 23-24. Petitioner argues that this provision allows the "pre-trial seizure" of protected material without a determination of obscenity. That claim lacks merit. Vesting title in the government from the time of the acts giving rise to forfeiture is not the same thing as a seizure; the government must still obtain a RICO conviction and prove the elements of forfeiture in order to obtain the property. The relation back provision merely ensures that the government's interest in the property subject to forfeiture is not extinguished in the period between the commission of the offense and judicial condemnation of the property.

both courts below correctly declined to address petitioner's challenge to the constitutionality of 18 U.S.C. 1962(c), so, too, those courts correctly declined to address petitioner's challenge to the constitutionality of the RICO forfeiture provision, 18 U.S.C. 1963(a), at this stage in the proceedings. Since petitioner's claim goes directly to the validity of several of the forfeiture allegations in the indictment, that claim was not properly raised by a motion to quash the restraining order, as discussed above. What is more, unless and until petitioner is convicted on a RICO count and any property is actually forfeited, petitioner's claim is premature, because it cannot be determined whether and to what extent any property will be forfeited. Following a conviction, if there is one, petitioner will have the opportunity to challenge the forfeiture on the grounds raised in this petition. Finally, the court of appeals made clear that it would defer any resolution of the questions that petitioner raises concerning the constitutionality of RICO's forfeiture provision until this Court has issued its decision in *Alexander*. Accordingly, there is no need to hold the petition pending the decision in *Alexander* in order to ensure that the Court's decision in that case will govern the ultimate outcome of this one.[7]

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[7] In *Adult Video Ass'n* v. *Barr*, *supra*, the Ninth Circuit held that RICO's pretrial restraint provision is facially unconstitutional because it authorizes the pretrial seizure of expressive materials without a judicial determination that they are obscene. 960 F.2d at 788. We filed a certiorari petition from the Ninth Circuit's decision (No. 92-773), asking this Court to hold the petition pending its decision in *Alexander* and to dispose of that petition as appropriate in light of the decision

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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in that case. That course is not appropriate in this case. Aside from the fact that the judgment in *Adult Video* was final (unlike the judgment below), petitioner does not raise the question resolved by the Ninth Circuit in *Adult Video*.